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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 SARAH PALIN, *an individual,*

5 Plaintiff,

6 v.

17 CV 4853 (JSR)

7 THE NEW YORK TIMES COMPANY, *a*
8 *New York corporation,*

9 Defendant.

10 ARGUMENT

11 -----x
12 New York, N.Y.
13 July 31, 2017
14 4:17 p.m.

15 Before:

16 HON. JED S. RAKOFF,

17 District Judge

18 APPEARANCES

19 BAJO CUVA COHEN TURKEL
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1 (Case called)

2 THE COURT: We are here on the motion to dismiss.

3 Just to frame the background, in an editorial that
4 appeared in *The New York Times* on June 14, 2017, the editorial
5 first identified two instances of mass shootings that were
6 "fueled by politics"; the second of those was the attack in
7 Tucson, Arizona by Jared Lee Loughner on January 8, 2011, which
8 seriously wounded representative Gabby Giffords. I might add,
9 though it has nothing to do with this motion or this case, that
10 everyone seems to have forgotten that there were five people
11 killed in that incident, including the chief judge John Roll of
12 the federal court.

13 In any event, the editorial stated: "The link to
14 political incitement was clear. Before the shooting, Sarah
15 Palin's political action committee circulated a map of targeted
16 electoral districts that put Ms. Giffords and 19 other
17 democrats under stylized crosshairs."

18 The editorial, also comparing that with the other
19 incident, the much more recent shooting on June 14, 2017
20 allegedly by James Hodgkinson, said the Hodgkinson shooting was
21 one in which there was "no sign of incitement as direct as in
22 the Giffords attack." However, the editorial also included a
23 hyperlink to an ABC News article that itself stated that "no
24 connection has been made between the crosshairs map and the
25 Arizona shooting."

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1 Within two days following the publication of the
2 editorial, *The Times* changed the text by deleting the phrase as
3 referring to the link to political incitement was clear and
4 referring to that there was no sign of incitement as direct as
5 in the Giffords attack, and adding the sentence: "But no
6 connection to that crime was ever established."

7 *The Times* also issued a correction in print and online
8 noting that: "An earlier version of this editorial incorrectly
9 stated that a link existed between political incitement and the
10 2011 shooting of representative Gabby Giffords. In fact, no
11 such link was established.

12 "The editorial also incorrectly described a map
13 distributed by a political action committee before that
14 shooting. It depicted electoral districts, not individual
15 democratic lawmakers, beneath stylized crosshairs."

16 So we're ready to hear first from moving counsel.

17 MR. SCHULZ: Thank you, Judge.

18 To clarify, maybe before I jump in on the timeline
19 that you just recited, the facts actually are -- although they
20 are not all pleaded in the complaint this way, but the
21 corrections were made within about 13 hours.

22 THE COURT: Okay.

23 MR. SCHULZ: The two corrections that were referred to
24 were about 45 minutes apart, so it was done very quickly,
25 although the exact times are not in the complaint.

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1 I'd like to start by stressing the First Amendment
2 overlay that exists here, because this case raises issues that
3 are of central concern to the First Amendment, which is
4 designed to protect robust speech on matters of public debate.

5 This is a case arising out of an editorial on gun
6 control issued the same day as that shooting. It wasn't
7 sometime earlier, it was that day, which also explains how it
8 was written and the time it was written under.

9 THE COURT: Well, I'm happy to hear your stump speech,
10 but I think it's common ground that when a public figure is
11 involved, even false statements are protected unless they were
12 done with actual malice. But if they are done with actual
13 malice, then there is no First Amendment protection, true?

14 MR. SCHULZ: That is correct, Judge.

15 But the point I'm trying to make is that the First
16 Amendment overlay affects all of the theories that we argued as
17 to why and the grounds for dismissal here are in view with
18 constitutional concerns. Everywhere there's a closed question,
19 the courts have made clear, the Second Circuit has made clear
20 that that First Amendment overlay says that you should be
21 resolving all doubts in favor of protecting the First
22 Amendment.

23 THE COURT: I hear you. But, on the other hand, isn't
24 it true on any motion to dismiss that all reasonable inferences
25 favorable to the adverse party, the party against whom the

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1 motion is directed, must be drawn in that party's favor?

2 MR. SCHULZ: Certainly, your Honor, on a motion to
3 dismiss.

4 THE COURT: This is a motion to dismiss.

5 MR. SCHULZ: I'm agreeing with you.

6 THE COURT: Okay.

7 MR. SCHULZ: But let's just start there with actual
8 malice, because that's what the Court brought up.

9 Ms. Palin's theory of her claim, which is clearly
10 articulated on page 14 of her memo, is that she has alleged
11 actual malice because, in her view, *The New York Times*
12 knowingly inserted a deliberate lie into that editorial and did
13 it for two reasons:

14 One, because it thought it could profit off the use of
15 her name because it would drive web traffic and add revenue;
16 and, second, because *The Times* doesn't really like Ms. Palin,
17 and it needed to use her -- in their words -- to mount a
18 counterattack on conservative and right-wing media who are
19 demanding condemnation of hate speech by anti-Trump liberals
20 and wanted to use her for a counter-narrative. That's their
21 theory of why there is actual malice here. On its face,
22 neither of those theories is plausible, given the facts that
23 are alleged and what we know.

24 What we know from the Second Circuit in the *Biro* case
25 is that this Court is charged with looking very closely at the

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1 allegations of actual malice in particular to determine whether
2 they meet that threshold. And as Judge Oetken noted in the
3 district court decision in that same case, this all makes sense
4 if you look at the constitutional concerns. Actual malice is
5 something very hard to prove at trial and intentionally so. It
6 requires evidence not just of a normal civil case, it requires
7 clear and convincing evidence; therefore, it's entirely
8 appropriate that on a 12(b)(6) motion that the Court must
9 require the plaintiff at a high threshold to make a reasonable
10 inference that there's plausible grounds to believe that actual
11 malice existed here.

12 THE COURT: I thought the definition of actual malice
13 was not a question of motive -- though motive may be part of
14 the mix that the Court may want to look at -- but under *New*
15 *York Times v. Sullivan*, actual malice is defined as knowledge
16 that the false statement was false or reckless disregard of
17 whether it was false or not. That's the standard, is it not?

18 MR. SCHULZ: Yes, it is, Judge.

19 Just to be clear, as the Supreme Court clarified in
20 *Garrison* and *St. Amant* and some other cases, both prongs of
21 actual knowledge and reckless disregard are intended to require
22 elements of knowledge of the defendant. Reckless disregard
23 doesn't mean they overlooked something; it means they had
24 serious doubts -- they weren't sure it was false, but they had
25 serious doubts and published anyway. So it's not a gross

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1 negligence standard.

2 THE COURT: I agree. It's definitely not gross
3 negligence. Reckless disregard is a well-established concept
4 in the law and it means usually stating something with
5 knowledge that there is a high probability that it is false.

6 MR. SCHULZ: Correct.

7 So the plaintiffs here are attempting to suggest to
8 the Court that you should find plausible reason to believe that
9 *The Times* published this knowing it or, as they put it, you
10 should find plausible reason to believe that it was an
11 intentional lie aimed at Ms. Palin because they had an economic
12 motive and because they have a political motive.

13 THE COURT: What I'm trying to get at is let's put
14 motive aside for the moment; I agree that that's not
15 irrelevant, but it's not itself a required aspect. You could
16 have a case where you have no idea what the motive is, but if
17 you had direct evidence of actual knowledge of falsity, that
18 would be sufficient.

19 So here, we have their own hyperlink showing that
20 there is no evidence of any link.

21 MR. SCHULZ: No established evidence.

22 THE COURT: And yet they are saying -- both directly
23 and indirectly -- that there is such a link.

24 MR. SCHULZ: Let's just take a peek.

25 I agree with you on motive, that the motive shouldn't

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1 matter. I just highlight that because in their memo opposing
2 this motion, that is their main reason for saying you should
3 find actual malice here, because there was a motive to lie.
4 The motive doesn't make sense. The motive doesn't even make
5 sense in the editorial. They say they wanted to use her to
6 push back on the conservative line. The editorial itself
7 adopts the conservative line. It says the conservatives are
8 right here; we should be upset on both sides by the rhetoric.
9 So their whole thing doesn't make sense on its own, but that's
10 their main theory.

11 But to turn to the question you are asking about, what
12 is the evidence of actual knowledge? Their arguments are
13 essentially that the fact of a link between the crosshairs map
14 and the shooting had been so debated and had been generally
15 discounted that it's inherently implausible that they didn't
16 know that it was untrue.

17 THE COURT: When you look at the map, it says SarahPAC
18 www. Then it says: "Twenty house democrats from districts we
19 carried in 2008 voted for the healthcare bill. It's time to
20 take a stand." Then there's a map that pinpoints each of those
21 districts.

22 MR. SCHULZ: And identifies each of the
23 representatives by name.

24 THE COURT: Below, not where the pinpointing occurs.
25 What even remotely plausible basis could anyone have

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1 for believing that that was an incitement referred to violence?

2 MR. SCHULZ: Well, Judge, you have to understand this
3 in the context of all of the facts that happened before. That
4 map was put out by a PAC, almost immediately after the house
5 voted in favor of ObamaCare. It was an anti-ObamaCare act and
6 it was essentially saying, These 20 representatives are in
7 districts that Sarah Palin and John McCain carried in the last
8 election. We need to target them and throw them out because
9 they voted for this horrible law.

10 THE COURT: Let's just stop there.

11 If it had said exactly what you just said, forget now
12 about the map, just what you just said, would you say that
13 anyone could plausibly or even conceivably view that as an
14 incitement to violence?

15 MR. SCHULZ: Well, you have to combine that with the
16 fact that --

17 THE COURT: Can you answer my question?

18 MR. SCHULZ: Yes, absolutely, Judge.

19 THE COURT: You think so?

20 So every time anyone says, We don't like the vote that
21 someone just made in Congress or anywhere else, and they are
22 coming up for reelection, let's target them for defeat, that,
23 in your view, could warrant any person, any reasonable person,
24 in saying, Oh, yes, that's an incitement to violence?

25 MR. SCHULZ: Judge, it has to be understood in

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1 context. It came out after this vote. There was a lot of
2 other rhetoric. Sarah Palin was tweeting at the same time, We
3 don't retreat; we reload.

4 THE COURT: I thought that was in a different context.

5 MR. SCHULZ: After that map came out, and this, again,
6 is in newspaper articles contemporaneous with this happening,
7 several of the representatives whose names were listed there,
8 were attacked or vandalized. They had their homes vandalized,
9 they had their offices vandalized, including Gabrielle
10 Giffords, her office was vandalized, which caused her to go on
11 national TV and decry this type, specifically citing the map,
12 saying, Words have consequences. This is bad.

13 And then, six months later, eight months later, she's
14 shot and this whole issue comes up again. It wasn't me
15 suggesting it; it was the No. 1 issue on Facebook that was
16 being debated about what role did the map --

17 THE COURT: Of course we all know that Facebook is the
18 standard of reasonableness.

19 MR. SCHULZ: But my point is, Judge, to your question,
20 people at the time thought that there was a link here; that
21 this was outrageous conduct and they were making a lot out of
22 it. It was widely discussed at the time.

23 THE COURT: I'm still at a loss to see what's
24 outrageous about this.

25 Supposing, instead of the crosshairs, which not only

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1 are part of a gun, but they are part of innumerable optical
2 instruments, but instead of crosshairs it had been a
3 bull's-eye, would your argument be the same?

4 MR. SCHULZ: The question is what would people -- what
5 would be the intended message there? Was it the message --

6 THE COURT: So you think every time Target Stores puts
7 out an ad, they are inciting people to violence?

8 MR. SCHULZ: No, Judge. It's not a question of what I
9 think; it's how people reacted to this ad. Remember, this
10 editorial was written, what, six years -- 2010 -- six or seven
11 years after this happened.

12 THE COURT: What it's asserting is not that people at
13 the time thought this, it's asserting as a fact that there's a
14 direct link between this and the shooting.

15 MR. SCHULZ: Right, Judge. You have to understand the
16 concept. The reason that the correction was made is that the
17 editorial writers, if you read the editorial literally for what
18 it says as to how it's characterized in the complaint, the
19 point that the writers were making is that in the Giffords
20 shooting, not that there was a causal link between the map and
21 the shooting, but there was a rhetorical link --

22 THE COURT: Whoa, whoa. Wait a minute.

23 MR. SCHULZ: Judge --

24 THE COURT: You think that the words "direct link" is
25 not a reference to causality?

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1 MR. SCHULZ: It was a link between the rhetoric and
2 the shooting, yes. And what they were trying to convey, Judge,
3 is all the things I was just saying. When the map came out,
4 there was all of this upset; that in the Giffords shooting,
5 Giffords had been named in the ad, her district had been
6 targeted as someone who should be thrown out of office. After
7 the ad came out, her campaign office was attacked; she made
8 national speeches about it; and then she was shot.

9 The point they were making is there's no similar
10 connection between this killer or the shooter in Virginia and
11 any of the people there. I'm sorry. There was no similar link
12 between Bernie Sanders, who everyone was saying incited this
13 killer, and anybody who was on that ball field. Bernie Sanders
14 never put out an ad saying, We've got to get rid of
15 Representative Scalise or any of the other people on the ball
16 field.

17 THE COURT: I'm sure Bernie Sanders' rhetoric was
18 quite cautious and quiet. That's certainly his reputation.

19 MR. SCHULZ: That's not my point, Judge. That is not
20 my point.

21 The point of the editorial was at least in the
22 Giffords case there was a direct link between the controversial
23 ad and the controversial statements and the person who was
24 shot. In the case of Bernie Sanders, all the controversial
25 statements and his fiery rhetoric against republicans was never

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1 directed against any of the individuals who were shot. That's
2 a fact. That's a simple point they were trying to get across.
3 When they realized the way they had phrased it, it was being
4 understood that there was a causal link, they immediately
5 corrected it. That's what's going on here.

6 So to go back to the actual malice argument, the
7 question is did they knowingly lie about causal link. There is
8 no plausible grounds to believe that from the facts that they
9 allege.

10 You start with the fact that there is this whole
11 history about what happened after the map came out and
12 instances of violence that they would have been aware of; that
13 it was widely discussed at the time of the shooting, that's in
14 the complaint, paragraph 24; and that other people had
15 construed this the same way. They don't talk about it. It's
16 Exhibit D to the second Brown declaration.

17 Six months before the shooting in Virginia, there was
18 a shooting in Washington, D.C., another mentally deranged
19 person went into a pizza store and shot up the store because he
20 believed political rumors he'd read online about Hillary
21 Clinton running a sex ring out of there with children.

22 *The Washington Post* at that point ran a column that
23 made much the same argument that *The Times* was making. On
24 December 6, 2016, it said, and I'm quoting: "Supporters of
25 former Alaska governor Sarah Palin put out a map with

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1 crosshairs targeting the districts of 20 house democrats."

2 *And then it continues: "On January 8, 2011, the day*
3 *of the shooting, the consequences were chilling. Words matter.*
4 *That kind of disregard for common sense and responsibility cuts*
5 *into what we have today. This editorial was part of an ongoing*
6 *political debate about the level of rhetoric, and The Times was*
7 *using it in the context of an article written on the day of two*
8 *mass shootings bemoaning the fact that there was insufficient*
9 *attention being paid to the need for gun control on both sides*
10 *of the political aisle. It was a gun control ad.*

11 THE COURT: Well, even on your reading there is no way
12 to read this, is there, as other than an assertion that the
13 political incitement that the map allegedly generated was a
14 cause of the shooting of representative Giffords for which
15 there was and remains zero evidence, right?

16 MR. SCHULZ: I don't know that there -- well, let me
17 put it this way: The editors were speculating and they were
18 repeating speculation that a lot of other people had said that
19 there is a link -- what they were saying is there is a link
20 between these mass shootings that are going on, they talked
21 about a pattern of mass shootings. The complaints suggest,
22 Well, there were only two. That's just not true. The
23 pizzagate is another example. There was the shooting in an
24 abortion clinic in Colorado Springs a few years earlier. In
25 2008, when Barack Obama was running, six people were killed --

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1 THE COURT: All the things you're mentioning might be
2 relevant on a motion for summary judgment; we're talking about
3 a motion to dismiss.

4 MR. SCHULZ: The question is is there plausible
5 evidence that this was an intentional lie, because that's the
6 theory of this case.

7 THE COURT: The question for this motion is have, they
8 taking all the facts most favorably to them and all reasonable
9 inferences most favorably to them, alleged enough to infer that
10 the writer of the editorial was acting with actual malice or
11 with reckless disregard. So it is unclear to me how all the
12 other things you are talking about, which go well beyond the
13 four corners of the complaint, are relevant to this motion.

14 MR. SCHULZ: Most of these are in the four corners of
15 the complaint, are referenced by things -- even the fact check,
16 which they have cited they add in Exhibit 11, a fact check of
17 the editorial that was done by *The Washington Post*, they say,
18 Oh, look, it proves that it was wrong. It does say there was
19 no established link; but that same fact check also goes on to
20 say it's unclear whether Loughner knew about the map.

21 So the fact is these are things that were subject to
22 dispute. The question is is it plausible to believe that the
23 editorial writers intentionally misrepresented the evidence,
24 when you know everything that's there.

25 There was a news article in the same paper that got

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1 the facts more correct, saying that there was no established
2 link. There were two op-eds in the same paper opposite the
3 editorial that get the facts right. There is a link --

4 THE COURT: So, I agree, that cuts both ways. But
5 what about the argument that that really is further evidence of
6 reckless disregard because they had ample -- whoever was
7 writing this editorial had ample evidence right before them
8 that there was no link.

9 MR. SCHULZ: Judge, that would make sense if they had
10 the evidence and they hid it. If they had the evidence and
11 they didn't make a correction, the reckless disregard is not
12 just overlooking a fact, it has to be some subjective awareness
13 that they got it wrong. And the fact that all of this evidence
14 is there and they correct it immediately, they don't try to
15 hide anything, it's just implausible to believe that that
16 supports a claim that they must have known that they did it.

17 That takes us back to motive. Plaintiff recognizes
18 that this is a problem. Well, it's not implausible to believe
19 that, because they thought they were going to make a lot of
20 money by putting Ms. Palin's name in the middle of a dense
21 editorial about gun control, not in the headline, no picture,
22 no nothing, and that somehow that's going to drive revenue.
23 The theory of their case is just fundamentally implausible.
24 The most they've demonstrated is an honest mistake that some
25 things weren't looked at; but that's not actual malice, that's

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1 negligence.

2 THE COURT: I know you have other arguments you want
3 to cover, but let's interrupt at this point; let me hear on the
4 actual malice issue from your adversary.

5 MR. SCHULZ: Certainly.

6 MR. VOGT: May it please the Court, your Honor, I
7 think that you've actually hit the nail on the head here.

8 THE COURT: Well, let me throw some nails at you. I
9 don't mean that as a direct link.

10 What possible motive would the writer of this
11 editorial have for accusing, as you would put it, Ms. Palin of
12 generating the conditions that led to this attack, when they
13 even hyperlink to something that says the opposite.

14 Motive, as I just pointed out, is not an essential
15 element, but it's not irrelevant.

16 What possible motive could they have?

17 MR. VOGT: I think *The Times* itself said in Exhibit 4
18 of the complaint, your Honor, which is an article that talks
19 about she who must not be named, in which Charles Blow
20 references that people on the left seem to need her, to bash
21 her, because she is, in their words, the way the left likes to
22 see the right: Hollow, dim, and mean.

23 She was a patsy in this instance. You have a shooting
24 that *The Times* has come out and said that they believe is
25 politically motivated by a leftist who has fear connections to

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1 the republican party. If your argument is going to be that
2 republicans should not go and attack the left now for political
3 rhetoric during that time period, a time period where you have
4 things like beheading photos of the president coming out --

5 THE COURT: This is not an editorial overall as
6 directed at Ms. Palin, and she wasn't at this time running for
7 any office or anything like that. This is an editorial
8 directed at the overall increase in highly divisive, charged
9 political language. The suggestion is that that can, in turn,
10 incite, in the wrong hands, people to take political actions of
11 violence.

12 That's the thrust, is it not?

13 MR. VOGL: I believe that the thrust is what the title
14 of the article is, which is *America's Lethal Politics*. There
15 are two examples cited in it, as you noted early on. One was
16 the shooting that day for which no one could tell whether a
17 political incitement was actually the cause or led to that
18 shooting. The only other example given was Sarah Palin. She
19 was the centerpiece of that article. At least that's a
20 reasonable interpretation.

21 THE COURT: Well, because, says your adversary, that
22 at the time, rightly or wrongly, rationally or irrationally,
23 there was a lot of debate as to whether this particular release
24 from her PAC had incited. So that, says your adversary, is a
25 natural reason why they would have used that as another

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1 example.

2 MR. VOGT: The problem is is that that was seven years
3 prior. You have by this time period no evidence being
4 generated, despite Mr. Loughner's entire criminal proceeding,
5 extensive FBI investigation, files that had been provided to
6 *The New York Times* through public records request, things of
7 that nature, which we allege in the complaint. You now have a
8 wealth of knowledge and six years of time have passed. There's
9 still no evidence --

10 THE COURT: So there's no doubt that in that sense
11 they got it wrong. But the question we are talking about is as
12 opposed to a mistake, what reason is there to believe that this
13 was done with actual malice?

14 MR. VOGT: I think that that's where you get into all
15 of the universe of evidence that we've pled in the complaint,
16 your Honor. When you're talking about the potential for
17 fabrication, the case law says that when you fail to cite a
18 source for a fact, that's evidence; that gives rise to an
19 inference that a fact had been fabricated in a publication.
20 We've alleged no source was cited here. This is a very
21 important fact about a very prominent person. When you were
22 going to say something along the lines that there is a link
23 between a political figure and --

24 THE COURT: Well, remember that the exact words on the
25 link is "the link to political incitement was clear." I don't

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1 know of any evidence you have in your complaint that this
2 release from her PAC did not generate political incitement.

3 MR. VOGT: Political incitement with respect to the
4 shooting in question, your Honor.

5 THE COURT: I think you're on stronger ground perhaps
6 when they get to "as direct as," the second sentence. But the
7 first sentence is probably demonstrably true, yes.

8 MR. VOGT: I wouldn't agree to that.

9 THE COURT: You don't think there was political
10 incitement and that all sorts of people -- maybe wrongly -- but
11 all sorts of people were saying, Oh, how could you put out this
12 release?

13 MR. VOGT: I think that I can argue contrary to that
14 simply based on the publications by *The Times* itself, including
15 those in its op-ed sections in which other op-ed writers, other
16 authors that wrote publications said no link had been
17 established. They said it back in 2011 --

18 THE COURT: Maybe the question is what is meant by
19 "political incitement." But just on its face, is not a release
20 that denounces certain democrats for voting for the health bill
21 and saying, It's time to take a stand, a deducement to an
22 incitement to political action?

23 MR. VOGT: I think the problem there though, Judge, is
24 there's no evidence to support --

25 THE COURT: Whoa, whoa.

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1 What do you think this was intended to do? Do you
2 think it was her PAC just was enamored with a map of the United
3 States?

4 On its face it was, was it not, an invitation to those
5 who felt similarly to the PAC to take political action.
6 Voting, of course, is what is the political action that it's
7 directed at, but it's at least that, is it not?

8 MR. VOGT: I would agree with that statement, your
9 Honor.

10 THE COURT: Okay. So it is linked to political
11 incitement. So what I'm getting at is that sentence, the link
12 to political incitement was clear, is probably true. What is
13 untrue, you're alleging, is what they then go on to say
14 followed from that, which is the link which they describe as,
15 in effect, direct to the Giffords shooting, yes?

16 MR. VOGT: Correct.

17 I think it's also important to remember the full
18 context of the surrounding material in the article that your
19 Honor was just discussing. Because when that political
20 incitement term first comes up, you're looking at an article
21 about America's lethal politics that has a highlighted quote
22 about a sickeningly familiar pattern arising that relates to
23 shootings of members of Congress. So it's reasonable that an
24 average person looking at that article would read the term
25 "political incitement" to actually mean the violence that was

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1 at the heart --

2 THE COURT: There's a difference between -- if this
3 editorial can only fairly be read as saying, Political rhetoric
4 has become overheated and we shouldn't be surprised, therefore,
5 that bad things happen when some deranged people fall prey to
6 that overheated rhetoric, then you would have no case.

7 So your case has to stand on the notion that it's
8 saying more than that; that it's saying that there is a direct
9 causal link between this article and the shooting.

10 MR. VOGT: Correct.

11 If you look at the admissions afterward, the
12 retractions, the apologies, they actually admit as a matter of
13 fact that no such link was ever established.

14 THE COURT: Well, so why isn't that really an argument
15 that while on its face the editorial doesn't necessarily carry
16 the implications you claim it does, once they realize that some
17 people were reading it that way, they wanted to make sure that
18 no one was under a misapprehension; so they then made the
19 corrections that they made so that even those people who were
20 misreading it would be disabused of their mistake.

21 MR. VOGT: I think that that's sort of where the
22 rubber meets the road on the inquiry on the motion to dismiss
23 phase, is we think that it is, on its face, capable of
24 defamatory meaning. In fact, people who read the article,
25 which we cited in our papers, other publications who looked at

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1 these statements that way, came to the conclusion that this was
2 not only about her, but it established a link between her map
3 and these shootings, a direct link.

4 THE COURT: I say to you a little bit what I said to
5 your adversary: It doesn't really matter, does it, what other
6 people thought; it's what it is. Either it is what you say it
7 is or it is what they say it is. All the commentators in the
8 world standing on the head of a pin doesn't make it more or
9 less what it is.

10 MR. VOGT: Ultimately the inquiry is whether six
11 people sitting in a box can look at this and determine whether
12 or not an average person would think that it was of and about
13 her and a statement of fact.

14 THE COURT: By the way, in my courtroom it's usually
15 nine.

16 MR. VOGT: Apologize, your Honor.

17 But that's really what we're getting to. At this
18 stage of the proceeding, I appreciate that arguments have been
19 made on the other side. I hope that we've made compelling
20 arguments as well. But that gets us right back to where we
21 are, which is at a motion to dismiss. Those types of issues
22 are best left for the nine people that ultimately will be
23 sitting here one day.

24 THE COURT: So your adversary says that one of the
25 implicit -- what they think is the implicit weakness of your

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1 position is shown by the fact that you'll hypothesize motives
2 that are implausible such as that this was done to generate
3 revenue. Why isn't that ridiculous on its face?

4 MR. VOGT: Well, because at this phase, which the case
5 law notes, when you're dealing with actual malice, all we can
6 do is hypothesize for the most part. We don't have the benefit
7 of depositions and discovery about what their actual thought
8 processes were.

9 THE COURT: Of course, that's true with respect to
10 every motion to dismiss that's ever been filed in any case in
11 the United States. So you're in no better or worse shape than
12 anyone else.

13 MR. VOGT: Right. So because of that though, this
14 specific area of the case law says that you look at
15 circumstantial evidence and derive inferences from those, all
16 of which have to be construed in our favor, and see whether or
17 not it's at least plausible or conceivable that this can
18 happen.

19 THE COURT: But as we know from the Supreme Court's
20 decisions in recent decades, the Court can take account of
21 whether something is plausible or not. Why isn't the revenue
22 argument patently implausible?

23 MR. VOGT: I don't think that it is because it's *The*
24 *New York Times* themselves who said, You have a member that
25 writes op-ed columns for *The Times*, did in '11, still does now,

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1 who said point-blank in an article that people write articles
2 about this woman and take shots at her because they inflame
3 passions and they derive revenue to websites.

4 There is no way it can be implausible.

5 THE COURT: So wait. So that governs what standard
6 this Court should apply? I can't just apply what I thought I
7 was supposed to apply, which is what a reasonable person would
8 find plausible or implausible; I have to apply what some
9 commentator somewhere in the world thought is plausible or
10 implausible?

11 MR. VOGT: I don't think that you have to apply --

12 THE COURT: I can even take Congress's note of it.

13 MR. VOGT: It's an admission of a party opponent.

14 THE COURT: Excuse me. I don't see how that can be
15 said.

16 No party opponent can tell a judge -- even through an
17 admission -- what a reasonable person would or would not find
18 plausible. That's not a question for a party opponent
19 admissions, assuming arguendo this is, which is, I think, a
20 question in itself. It's a question for the Court.

21 MR. VOGT: I agree, your Honor.

22 My only point was that that's evidence that the Court
23 can consider. It seemed like the Court was inferring that
24 there was nothing in the complaint that would establish that
25 that argument was plausible. I was simply pointing out to say,

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1 Well, *The Times* obviously thought it was plausible because they
2 themselves have said, including the editorial department.

3 THE COURT: Let's go back to your adversary. We're
4 going to come back to you in a few minutes.

5 But we'll hear anything further that defense counsel
6 wants to say on actual malice. And then if there are other
7 issues you wanted to raise, I'll hear you on that.

8 MR. SCHULZ: Thank you, Judge.

9 First, on actual malice, I do think that it's
10 implausible to suggest her motive was to make money. Even if
11 you accept that Ms. Palin is a lightning rod, people will read
12 about her, they would have put her in the headline, they would
13 have made a photo. The suggestion that the headline shows that
14 this was about her, this is an editorial about gun control in
15 which the shooting of Gabby Giffords and the potential link of
16 that sort of type of rhetoric that Sarah Palin's PAC put out is
17 kind of a passing thing.

18 THE COURT: Their argument is that Sarah Palin, for
19 better or worse, is a hot-button person; and that by using her
20 as an example, they generate greater support for their
21 editorial, which then translates indirectly into increased
22 revenue for *The Times*, something like that. I admit I'm having
23 a little trouble with their argument in that regard, but what
24 about that?

25 MR. SCHULZ: And the argument might make sense if they

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1 made up something just to put Sarah Palin in here. They were
2 harkening back to a controversy that had been going on for
3 years about the impact of that ad that had been cited as
4 recently as six months earlier by *The Washington Post* in the
5 same context. The point of this article was not about Sarah
6 Palin, it was about America's politicians' inability to pass
7 common-sense gun reform. It was an editorial written on a day
8 in which there were two mass shootings in the country.

9 THE COURT: Excuse me for interrupting.

10 But they not only singled out Sarah Palin, but they
11 single her out much more strongly than the other example.

12 MR. SCHULZ: Well, they single her out because, as
13 they say, there was a more clear link between the whole episode
14 involving her and Gabby Giffords that didn't exist with Bernie
15 Sanders and Steve Scalise. That's the only point they were
16 making.

17 Your Honor, you just were asking my adversary about
18 this notion, you said, doesn't the map on its face is an
19 invitation to take action. And it is. And one of the points
20 that is of concern here is that that type of rhetoric, that the
21 use of military or weapons symbolism in this way does incite
22 people to action, we know it happened after the map came out,
23 that there was increased security for the people who were named
24 there, there were real consequences and that's what they were
25 talking about.

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1 The editorial was bemoaning the fact that that type of
2 rhetoric does invite people who are deranged or mentally
3 unstable to do things; it inflames them, like the person at the
4 pizza shootout, like the man who went to Planned Parenthood,
5 like the person who shot all the city council in Missouri, like
6 the person who killed a democratic party leader in Arkansas.
7 These people have mental illnesses, but they hear the rhetoric
8 and they get inflamed. That's the point it was making.

9 Just to finish up on actual malice, I want to go back
10 to the signal constitutional concerns and the questions.

11 As I said at the outset, the Second Circuit in *Biro*
12 has stressed the constitutional importance of the actual malice
13 inquiry itself; and that a court is charged to be sure that
14 they meet the pleading standard. I would submit that they
15 haven't here.

16 But I'd also like to cite your Honor to the opinion of
17 the D.C. Circuit in *Ollman*, which was dealing with a different
18 issue; it was a pre-*Milkovich* case about is there a special
19 protection for opinion. But the court was really grappling
20 with the same issue of when we know there are significant
21 constitutional First Amendment concerns at stake, how do we
22 deal with that in deciding whether a claim should go forward or
23 not?

24 And then a concurrence in the *en banc*, Judge Bork
25 writes at length about how a court should address whether

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1 something that is said is actionable or not actionable in
2 taking account of the First Amendment considerations. He says
3 there's three things we should be looking at in trying to
4 figure out where the First Amendment line should be drawn or
5 what type of speech should be deemed not actionable.

6 So the first thing is the nature of the speech and the
7 parties involved. What we have here is an intense political
8 debate about gun control and a leading figure in that debate
9 who's bringing this libel claim here. It's clearly at the
10 heart of what the First Amendment was intended to protect to
11 allow that type of things, as Judge Bork --

12 THE COURT: Let's hypothesize for a moment.

13 I don't mean to interrupt your recitation of what
14 another circuit had to say, but supposing the writer of this
15 editorial, before the editorial is published, sees the
16 hyperlink, say the editor adds the hyperlink, as common
17 experience suggests is often done. The writer reads the
18 hyperlink and sees that there is no direct connection or
19 nothing has been established that suggests anything like a
20 direct connection.

21 In my hypothetical, the writer says, I don't care.
22 I'm going to leave it as is.

23 Would that be evidence of actual malice?

24 MR. SCHULZ: In your hypothetical, I think if the
25 writer knew that there was something that was materially wrong

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1 and decided to publish anyway, that would be evidence of
2 reckless disregard malice.

3 THE COURT: So reading the complaint most favorably --
4 but still reasonably -- to the adversary, why isn't that at
5 least a plausible possibility that should allow this case to go
6 to discovery?

7 MR. SCHULZ: Because it's not plausible given all the
8 other facts. The link was left in there. If they intended to
9 mislead people and they had read that, why would they leave the
10 link there? If they had read the rest of the paper and read
11 these other things into it, the only plausible thing that can
12 be concluded from all the facts that have been put before the
13 Court is that an error was made, an honest mistake was made in
14 how it was phrased.

15 Again, I keep coming back, we're accepting for
16 purposes of this argument that the editorial means what they
17 said it meant. But I don't think that's actually a fair
18 reading. And when we get into this and talk to the editorial
19 writers about what they actually intended, I don't think that
20 the editorial intended to say there was a direct cause
21 between --

22 THE COURT: Certainly used the word "direct."

23 MR. SCHULZ: They say there was a clear link between
24 that type of rhetoric and the attack on Gabby Giffords, because
25 she was in it, her office was vandalized, she spoke about it,

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1 there was a whole set of connections between her and the
2 political rhetoric that didn't exist with Steve Scalise and the
3 democratic rhetoric. That's the point they were making. It's
4 a simple point. It wasn't necessarily that Loughner sought and
5 was motivated because of the map. That's not the point they
6 were trying to make. But even accepting that, I say it's
7 implausible to believe that they knowingly made that statement,
8 given what's here.

9 So just to return to *Ollman* quickly, so in deciding
10 where you should draw these lines, the first question is we're
11 in the core because of the parties and the nature of the
12 speech. The second is what is the impact of allowing this case
13 to go forward? In other words, what's the nature of the proof
14 that they are going to be going after?

15 They say that to go forward with this case and to make
16 their case, they need to know everything that 23 people at *The*
17 *Times* who work there now or used to work there, that they wrote
18 that might show that they had ill will towards --

19 THE COURT: No, no. I think that's a separate issue.

20 If their discovery requests are overbroad, then we
21 need to cut them down. But I don't see what that has to do
22 with the motion to dismiss.

23 I understand totally why there are First Amendment
24 policy concerns here, that's why the Supreme Court decided *New*
25 *York Times v. Sullivan* and subsequent cases.

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1 But I think the law -- I'm just a simple barefoot
2 district judge. The law here seems to me very clear. The law
3 is we know what actual malice is defined as; it's either
4 knowledge of falsity or reckless disregard. Assuming the rest
5 meets the requirements, either they've alleged that
6 sufficiently to pass the standards or they haven't. And all
7 the rest seems to me to be secondary.

8 MR. SCHULZ: I would agree with you, Judge, that the
9 actual malice test itself is driven by the First Amendment.
10 All I'm suggesting is particularly in light of *Biro* and the
11 Second Circuit's concern that these things be carefully
12 considered at this stage, because the whole point of having
13 these protections is to avoid the chilling impact of the burden
14 of litigation, the threat of major recoveries of the time and
15 the effort.

16 THE COURT: Sure. That would be true whether they've
17 asked for 23 depositions or one deposition, the same policy
18 would still apply.

19 MR. SCHULZ: That's true.

20 But my point is that's why it's important to consider
21 these at this stage and not down the road.

22 THE COURT: All right.

23 Do you want to turn to your other issues?

24 MR. SCHULZ: I was going to turn to -- since we are on
25 *Ollman*, *Ollman* itself was about when do you have a claim that's

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1 actionable. Maybe I should turn to this question of whether
2 there is provably false.

3 (Continued on next page)

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1 MR. SCHULZ: (Continuing) Another reason why this
2 case should be thrown out at the pleading stage is that what's
3 at the heart of this, what they claim in the complaint, is the
4 defamation is not provably true or false; and therefore the
5 case shouldn't be allowed to go forward. And that's exactly
6 what Judge Bork was analyzing in the Ollman case.

7 THE COURT: Eventually I'll let you get to the quoting
8 Ollman, but I'm not sure why, taking it, again, most favorably
9 to them, why this is in effect a statement of fact, that there
10 was a direct causal link between the Sarah Palin PAC release
11 and the shooting of Representative Giffords. The Times,
12 because of that danger, the people that would be interpreting
13 it that way corrected it 13 hours later or whatever. But that
14 very fact, your adversary points out, suggests that people were
15 reading it that way. And why isn't it on its face a fair
16 reading? It may not be the only reading, but why isn't it a
17 fair reading?

18 MR. SCHULZ: I understand, Judge. And my
19 understanding to that is, that doesn't get at the gist of our
20 objection or our concern that we say the reason why this is not
21 an actual -- it's not a question of whether it's a fact or an
22 opinion. Like Milkovich itself says, that's not the concern,
23 we don't need to other about what we characterize it as. The
24 question is, is this a type of fact that is a fair subject for
25 litigation in a libel case. And the fact here, what they've

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1 claimed the defamatory meaning is, very clearly in paragraph 1
2 and repeated throughout the complaint, they say the defamatory
3 meaning that they want to show the jury that was conveyed is
4 that Ms. Palin incited Jared Loughner to shoot. So, even if
5 you accept that, the question is the editor's speculation about
6 what was in Jared Loughner's mind, right?

7 And the courts repeatedly have said that's not an
8 appropriate basis for libel litigation, understanding what
9 people's motives were, and it doesn't matter whether you call
10 it fact or opinion. The Village Voice versus Rappaport case,
11 cited in our brief, was presented as a question of historic
12 fact, and the court said, what you label it doesn't matter, the
13 question is, is it the type of fact --

14 THE COURT: So, to take a purely, purely hypothetical
15 case, supposing, hypothetically, a high government official, in
16 addressing a group of police officers, said, you've been much
17 too nice to the people you're arresting; for example, you help
18 them into the arrest vehicle, making sure they don't bump their
19 heads, and why are you being so nice? And then, in my pure
20 hypothetical, two days later, a policeman doesn't any longer
21 put his hand on the head of the person he's arresting -- a
22 policeman who heard this speech -- and so the guy bumps his
23 head. Are you saying whether the policeman did that because of
24 what the high public official had told him, it's not a question
25 of fact?

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1 MR. SCHULZ: Again, I say it's not a question of
2 whether you call it a fact or not. It's a question of is that
3 the type of issue that should be fairly the subject of a
4 litigation claim. If a newspaper had a photograph of the cop
5 doing that and said this is what President Trump wants people
6 to do, that this was done because of the statements that were
7 made by this high government official --

8 THE COURT: I'm not dealing with President Trump. I'm
9 dealing with a total hypothetical.

10 MR. SCHULZ: But my point is, that would be the
11 speculation of the newspaper of what was in that guy's mind.
12 Now, it might be a question of fact but their interpretation of
13 that situation they're entitled to have, and it doesn't matter
14 whether you call it a fact or not. The fact that, as has been
15 widely reported, there's been no evidence that Jared Loughner
16 actually saw the map doesn't necessarily refute the claim that
17 this type of speech --

18 THE COURT: Let me make sure I understand. So
19 supposing Mr. Loughner, again, contrary to fact, but supposing
20 Mr. Loughner had said, you know, I read Sarah Palin's call to
21 action, I'm planning to go out and shoot Representative
22 Giffords. If I understand your theory, who knows, even though
23 he said that, maybe it was really his psychoanalytical problems
24 that were motivating him, maybe he was being motivated by the
25 demons of his demented mind, so it's not fair game for an

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1 actual malice claim. How can that be?

2 MR. SCHULZ: Well, we're not on actual malice here.
3 We're on whether --

4 THE COURT: No, right, I'm sorry. How can it be that
5 that's not the kind of thing that could be the subject of a
6 lawsuit in this claim?

7 MR. SCHULZ: Again, it's because the person who's
8 being sued is commenting on a set of facts where they have a
9 point of view, and they're suggesting that they believe there
10 could be a link here or that they see a causal connection here,
11 that they have a right to articulate that, again, going back to
12 Ollman, where these things exist, where it's a clear public
13 debate and involving a public figure, where allowing the case
14 to go forward is going to have a chilling effect on people
15 talking about these types of things.

16 THE COURT: So, again, just to make sure I understand
17 your position, again, contrary to the facts, just as a
18 hypothetical, if the editorial had said Mr. Loughner admitted
19 that the reason he shot Representative Giffords was because he
20 had been motivated by the release from the Sarah Palin PAC and,
21 in my hypothetical, that's false and they had no basis for
22 saying that but they said it, are you saying that you could not
23 bring a defamation lawsuit in that circumstance?

24 MR. SCHULZ: I lost the thread. What is it that they
25 said was false?

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1 THE COURT: That he was motivated by reading the Sarah
2 Palin PAC release to shoot Representative Giffords?

3 MR. SCHULZ: Again, if it's a question of someone's
4 motivation -- that's what Haynes holds very specifically and a
5 number of other cases, that that's not the type of thing.
6 Again, taking the context and where we are, that there are
7 First Amendment protections that should exist around people's
8 ability, a newspaper's ability, to talk about matters of public
9 concern, involving public figures, and particularly where to
10 allow the case to go forward, the discovery is going to be
11 about, well, what was Jared --

12 THE COURT: If I understand your position, it is that
13 even if you have actual malice, you can make up anything you
14 want and as long as you say it's about motivation and it's a
15 public figure, you can't be sued?

16 MR. SCHULZ: I'd have to think about the limits of
17 that, Judge. Obviously, we're talking about a range. The
18 question is, can you make things up that you know to be untrue?
19 Well, then whether it's proveably true or false, if it's
20 damaged their reputation and they can prove that you knew it to
21 be untrue, I guess I'd have to think about how those pieces fit
22 together. But the point is, in this case, we have arguably no
23 plausible claim that there was an intentional lie that was
24 made, and what they want to go forward on, if we're going to
25 try to prove the truth of it or make a defense of truth, it's

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1 going to involve incredible amounts of investigation into what
2 were his real motivations. It's not enough to just say no link
3 has been established. What is posited here is that this type
4 of rhetoric has ill effects. Did Jared Loughner see Gabriele
5 Giffords on TV after her office was ransacked, saying this
6 stuff has repercussions, and did that inflame him in any way?
7 What were the other effects of this type of rhetoric that may
8 have had an influence on him? That's just not an
9 appropriate -- it's not the sort of proveably true or false
10 thing. It's really very, very similar to Haynes, where the
11 issue was the statement was made that, as a matter of fact,
12 that the plaintiff had left his wife because he was motivated
13 to make more money and that money made him leave his family.
14 Well, what he did or didn't do as a fact, that doesn't make it
15 actionable. That's the holding of Haynes.

16 THE COURT: Learned Hand -- you may have heard of him.

17 MR. SCHULZ: Rings a bell.

18 THE COURT: -- famously said that the state of a man's
19 mind is a fact just as much as the state of his digestion. And
20 I'm not sure where the difference lies, but let me hear from
21 your adversary --

22 MR. SCHULZ: Should I say anything else? There were
23 two other points.

24 THE COURT: I'm a little concerned, as I have an
25 ongoing bench trial that is already slated to go to

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1 8:00 o'clock tonight, and I know both sides submitted very full
2 briefs, but if there's something you're dying to say on the
3 other two points, go ahead.

4 MR. SCHULZ: Well, I think they're covered in my
5 brief. On the disparagement point, the economic damages, I
6 just want to point out the fact that in responding to our
7 motion their basic position was, well, there's no common law to
8 support this theory but because of changes you should. And I
9 want to underscore that, as a federal court applying state law,
10 it's entirely inappropriate to create new causes of action.
11 They don't cite any state law that accepts this and Gertz
12 specifically prohibits it, as a constitutional matter.

13 THE COURT: Yes. Very good. Thank you very much.

14 Let me hear from plaintiff's counsel. Just real
15 quickly, on the last point, are you still pursuing that theory
16 of damages?

17 MR. VOGT: The restitution theory?

18 THE COURT: Yes.

19 MR. VOGT: The reason --

20 THE COURT: That has, as I understand it, no support
21 in any case that you have cited to me or that has been called
22 to my attention that is contrary to at least the statements of
23 the New York State courts that govern this issue and that
24 appears to be an invitation to the Court to make up new law for
25 the State of New York. But other than those few problems, do

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1 you still want to pursue that part of your claim?

2 MR. VOGT: Your Honor, I think that this is a truly
3 unique and special circumstance, which warrants at least the
4 raising of these types of damages in this case, because what
5 you have is a situation where before you get the benefit of
6 discovery, and knowing what was going on behind the scenes, you
7 at least do have this admission that people used the benefit of
8 this woman's name to derive an economic benefit. That's the
9 hallmark --

10 THE COURT: I'm not at all clear that it constitutes
11 an admission, but that's a separate issue. I don't know where
12 that gives me the power to create an entire new form of damages
13 that has never been applied to this kind of case.

14 MR. VOGT: The only thing I would say, Judge --

15 THE COURT: And I'm not an unimaginative judge but
16 give me a break.

17 MR. VOGT: The only thing is, I would say this -- and
18 this is why we went back with quite a bit with some of the case
19 law that we cited -- it's not really a new or expansion of an
20 area of law. Restitution has been around for a long, long
21 time.

22 THE COURT: But not for a defamation claim.

23 MR. VOGT: It has been for torts and contracts. And
24 the remedy of restitution has been applied in invasion of
25 privacy cases, which the court in New York in the Hart case

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1 said is a libel --

2 THE COURT: Okay. Well, I will look again at your
3 papers but why don't you move on to the other matters.

4 MR. VOGT: Is there anything your Honor wants me to
5 address in particular? Because I know a lot was said.

6 THE COURT: I think the only point that you might want
7 to address is their statement that putting aside -- even
8 assuming actual malice, what's being in effect alleged here is
9 something about Mr. Loughner's motivation which doesn't lend
10 itself then to this kind of cause of action.

11 MR. VOGT: I think our papers are clear on this as
12 well, but when you state that there exists a link between a map
13 that has come out and the commission of this horrific crime,
14 that is a statement of fact. That is so much of a statement of
15 fact, that when the Times came out and made the corrections
16 about this, they said, we made an error of fact. When the head
17 of the editorial board released a statement to CNN, which is
18 also included in the complaint, he said, we made an error of
19 fact. In the correction itself, it says: We incorrectly
20 stated that a link existed between political incitement and the
21 2011 shooting. In fact, no such link was established.

22 Repeatedly you have The Times saying, we made an error of fact.

23 THE COURT: Yes, but I come back to the same point I
24 was making to your adversary. I'm not bound by the parties'
25 characterizations. In fact, I have to look at this on what the

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1 facts and the law are that are presented to me, not what
2 someone claims are the, quote, facts. If The Times described
3 as a fact what in fact in law is an opinion, then it's still an
4 opinion. Right?

5 MR. VOGT: It could be. But then you'd have to look
6 at, even if you considered it to be an opinion, whether or not
7 it's based on undisclosed facts because, as we set forth in our
8 moving papers, Judge, if it's based on --

9 THE COURT: You're saying that implicit in their,
10 quote, opinion, assuming we were to view it that way, are
11 assumptions of fact that can be falsified or proven, as the
12 case may be, and therefore there are facts being asserted here,
13 even if ultimately it leads to an opinion, but it's an opinion
14 that is based on, among other things, proveable or falsifiable
15 facts?

16 MR. VOGT: Correct. And I think that is a distinction
17 between the case that my adversary was noting, where the
18 husband leaving for another woman, the court -- I believe the
19 quote is -- the author there didn't pretend to have the inside
20 dope. It's the opposite here. You have the newspaper of
21 record, with its entire editorial board, putting out a piece
22 saying a link was established; not only was that link
23 established but it was clear and it was direct. That's not the
24 situation that you have in the book in that case.

25 So I think, your Honor, you're not here talking about

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1 a situation that's not verifiable. I would point out -- I know
2 it's not binding on the Court, but we did cite to a Texas case
3 which at least factually was the most similar thing that I
4 could find here, which was the Darby case out of Texas, where
5 the New York Times was sued because a reporter made a claim
6 that an FBI informant had encouraged a plot to throw firebombs
7 at a political convention. And in that case, the Court
8 concluded that that's not a statement of unfair libel opinion.
9 Encouragement is very similar to incitement. I know that the
10 phraseology is not identical, but in that case at least, The
11 Times had to defend itself against the claim.

12 THE COURT: Thank you very much.

13 I want to thank both counsel both for their excellent
14 arguments and also for politely enduring my dumb questions.
15 This is an interesting matter, not as interesting, of course,
16 as the bench trial I'm conducting right now, but here's what I
17 am going to do: I will get you a decision on this motion no
18 later than the end of August, but I am going to stay all
19 discovery until then. And then, depending how we come out on
20 that, we'll either move forward on discovery or not and adjust
21 the schedule a little bit if we have to as a result. So, I'll
22 reserve for now, and take the matter sub judice.

23 Anything else anyone needs to raise?

24 Very good. Thanks very much.

25 MR. BROWN: Thank you, your Honor. * * *